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JAMES R. BROWNING, Clerk

Supreme Court of the United States

OCTOBER TERM, 1960

No. 568

NATIONAL PSYCHOLOGICAL ASSOCIATION FOR PSYCHOANALYSIS, INC., THEODOR REIK, SANDOR FODOR, EDWARD FRANKEL, and SAUL GUREVITZ,

Appellants,

against

UNIVERSITY OF THE STATE OF NEW YORK,

Appellee.

ON APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

BRIEF OPPOSING MOTION TO DISMISS OR AFFIRM

LYMAN STANSKY,
Attorney for Appellants,
122 East 58th Street,
New York 22, N. Y.

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Appellee's motion to dismiss or to affirm the court below, received on January 6, 1961, is based on claims 1) that no substantial federal question is involved; 2) that the appeal is devoid of merit; 3) that it is moot as to the individual appellants; and 4) that the corporate appellant (NPAP) lacks standing (Motion p. 1).

This brief is intended to supplement the Jurisdictional Statement, and is limited to movant's 3 and 4 above.

The Individual Appellants Have Standing Despite *Pendente Lite* Certification

The doctrine of estoppel is not applicable. One does not lose his right to test the constitutionality of a statute by not incurring the peril of defiance *pendente lite*.

Gidney v. *Marlton*, 258 N. Y. 355;
Robins D. D. & R. Co. v. *Robinson*, 271 U. S. 649.

Their position is that the statutory failure to define psychology and psychological services continues to subject them to the threat of criminal penalties under a statute too vague and indefinite for constitutional validity.

Even after certification, certificants-appellants are required to make biennial fee payments under pain of penal sanctions and loss of certification (§ 7606, Appendix 33). The certificate may be suspended or revoked, on proof that certificant has been guilty of fraud or deceit in connection with his services rendered as a psychologist, or has been guilty of unprofessional conduct (§ 7607.1, Appendix 33). Violations of the provisions of the Act, which include the above, is a misdemeanor punishable by imprinsonment "for not more than six months or by a fine of not more than $500, or by both . . . and each violation shall be deemed a separate offense" (§ 7608, Appendix 33).

> "A state cannot, 'under the guise of protecting the public, arbitrarily interfere with private business or prohibit lawful occupations or impose unreasonable and unnecessary restrictions upon them' ".
>
> *Liggett Co.* v. *Baldridge*, 278 U. S. 105, 111-113.

The Standing of the Corporate Appellant (NPAP)

While this is presented in the Jurisdictional Statement (pp. 10-11) the emphasis created by appellee's motion seems to require some discussion.

Unreported decisions of the Supreme Court of the State of New York sustaining the justiciable interest of NPAP, made when it was the sole plaintiff, were included (Appendix 21, 22) without claim that they were a binding adjudication. Appellants felt that the rules of this court

required inclusion, and that they were of interest, if only academic, as an issue that had been exhaustively presented to the court of original jurisdiction.

Appellee now claims that NPAP is not affected by the Statute because it is not chartered as a psychology school. The New York Education Law does not require that psychology schools be chartered. Appellee had approved NPAP's certificate, which expressly permits it "to provide professional inspiration for training and research in the field of psychoanalysis" (32-35, 38).

Neither statute nor charter forbids NPAP from conducting its training program for the purpose of qualifying members. The charter is broad enough to authorize the training program it conducts for this purpose. Even if this presents a question of fact, NPAP's claim that it can legally conduct such a program should be accepted as pleaded.

Where denial of a constitutional right is claimed, even factual matters may be reviewed on appeal.

> *Niemotko* v. *State of Maryland*, 340 U. S. 268, 271; *Joseph Burstyn, Inc.* v. *Wilson*, 343 U. S. 495, 506.

The right of the school to bring suit in *Pierce* v. *Society*, 268 U. S. 510, was unanimously upheld despite the fact that the statute had not yet become effective, and did not prohibit, regulate, tax, require registration of, nor otherwise impinge directly on, private schools.

> cf. *Barrow* v. *Jackson* (1953), 346 U. S. 249.

The motion should be denied with costs.

Respectfully submitted,

LYMAN STANSKY,
Attorney for Appellants.